Supreme Court, U.S.
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No. 94-106

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BECTON DICKINSON AND COMPANY,
Petitioner,

v.

UNITED STATES, *ex rel.* DAVID R. SILLER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT DAVID R. SILLER IN OPPOSITION

ROBERT L. VOGEL
1225 19th Street, N.W.
Suite 710
Washington, D.C. 20036
(202) 223-1694
Counsel of Record for Respondent David R. Siller

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Did the Fourth Circuit correctly hold that a *qui tam* action under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, is not "based upon" an earlier "public disclosure of allegations or transactions," where the relator did not derive his knowledge of the allegations or transactions from any "public disclosure"?

2. Did the Fourth Circuit correctly hold that a relator in a *qui tam* action is an "original source" within the meaning of 31 U.S.C. § 3730(e)(4), where the relator met both statutory criteria of that term, *i.e.*, he had "direct and independent knowledge of the information on which the allegations are based," and he "voluntarily provided the information to the Government before filing an action" based on that information?

3. May a district court, in its discretion, choose not to dismiss the Government from a *qui tam* action, where the Government has failed to comply with an earlier court-imposed deadline for electing whether to intervene in the action?

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OPINIONS BELOW

Respondent incorporates by reference the Opinions Below section in the Petition for Writ of Certiorari.

JURISDICTION

Respondent incorporates by reference the Jurisdiction section in the Petition for Writ of Certiorari.

PERTINENT STATUTES

Respondent incorporates by reference the Pertinent Statutes section in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

1. The History of the False Claims Act.

The False Claims Act (the "Act") is the Government's primary tool for recovering monies lost as the result of fraud against the Government. *See* S. Rep. No. 345, 99th Cong., 2d Sess. at 2 (1986) ("S. Rep."), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266 ("USCCAN"). The Act provides that those who knowingly submit or cause the submission of false claims for payment by the federal Government, or who knowingly use false statements to get such claims approved, are liable for treble damages plus civil penalties of between $5,000 to $10,000 per false claim. 31 U.S.C. § 3729 (1992 Cum. Supp.).

Since its original enactment in 1863, the Act has contained a "*qui tam*" provision enabling a private citizen (the relator) to enforce the Act's provisions by filing a lawsuit as a private attorney general. *See United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1496-98 (11th Cir. 1991). If the Government recovered in such a case, the relator was entitled to a percentage of the Government's recovery. The *qui tam* provision was conceived as a means to increase the Government's recoveries by encouraging citizens to report fraud "under the strong stimulus of personal ill will or in the hope of gain." *United States v. Griswold*, 24 F. 361 (D. Ore. 1885), *aff'd*, 30 F. 762 (C.C. Ore. 1887).

During the 1940s, citizens were filing *qui tam* actions based solely on information copied from criminal indictments. *See* S. Rep. at 8-10, USCCAN at 5273-75. This practice was upheld by the Supreme Court in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545-48, 63 S.Ct. 379, 384-86 (1943). As a result of this practice, to prevent parasitic actons such as the one addressed in *Marcus*, Congress in 1943 amended the Act's *qui tam* provisions to bar any lawsuit based on information al-

ready in the possession of the Government at the time the lawsuit was filed. *See United States v. Pittman*, 151 F.2d 851, 853-54 (5th Cir. 1945), *cert. denied*, 328 U.S. 843 (1946); 31 U.S.C. §§ 3730(b)(4), 3730(c)(1) (1982) (superseded).

Congress overhauled the Act, including its *qui tam* provisions, in 1986. The purpose of the False Claims Amendments Act of 1986 was to increase the Government's ability to combat fraud by, among other things, expanding the *qui tam* provisions to encourage more private enforcement suits. S. Rep. at 23-24, USCCAN at 5288-89.

The revisions of the *qui tam* provisions were intended to serve two main objectives. First, Congress sought to encourage more private citizens to bring evidence and information about fraud to the Government's attention. Congress recognized that a major impediment to law enforcement efforts was a "conspiracy of silence" among employees of Government contractors, which conspiracy was fostered by various forums of retaliation against whistleblowers. S. Rep. at 5-6, USCCAN at 5270-71.

Second, Congress sought to encourage private citizens to contribute additional resources to the Government's actual prosecutorial efforts. The Senate Report accompanying the Act noted that "perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies. . . . [These amendments] which allow and encourage assistance from the private citizenry can make a significant impact on bolstering the Government's fraud enforcement effort." S. Rep. at 7-8, USCCAN at 5272-73.

In order to make it worthwhile for whistleblowers to report fraud and to assist in the Government's law enforcement efforts, Congress enacted several fundamental changes to the *qui tam* provisions. One of the most significant changes was to relax the Act's jurisdictional requirements so that any whistleblower with knowledge of

fraud—except for "parasitic" whistleblowers, such as the one in *Marcus*, who derived their knowledge entirely from certain public sources of information—was eligible to prosecute a *qui tam* suit.

Accordingly, Congress replaced the 1943 Act's "government knowledge" bar with 31 U.S.C. § 3730(e)(4), which provided:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under the section which is based on the information.

These two provisions are commonly referred to as the "public disclosure" bar and the "original source" exception to that bar.

2. The Origin of the Instant Case.

From January 1986 until after the filing of this lawsuit in January 1991, David R. Siller ("the relator") was an employee of Scientific Supply, Inc. ("SSI"), a distributor of health care products located in San Antonio, Texas. The president of SSI was Ruben Siller, the relator's brother. Until 1987, SSI was an authorized distributor of medical device products manufactured by the defendant, Becton Dickinson and Company ("BD"). Pet. App. 3a.

The relator became familiar with BD's marketing and sales practices through his employment with SSI. He was directly responsible for many sales to both U.S. Government and non-U.S. Government entities. Through his employment, the relator learned that BD routinely sold its products to the federal Government at prices higher than those charged to other entities. Pet. App. 3a-4a; J.A. at 47, ¶ 4.[1]

The relator first learned about the False Claims Act, including its *qui tam* provisions, in the Spring of 1990. After retaining counsel, on December 27, 1990, the relator voluntarily disclosed all the information and evidence he had concerning this case to the Department of Veterans' Affairs Office of Inspector General ("VA/OIG"). Pet. App. 4a. His comprehensive disclosure included, among other things, a detailed explanation of BD's alleged fraudulent scheme, numerous supporting documents, an estimate of the cost impact to the Government, a list of material witnesses and description of the information they might provide, and a proposed strategy for discovery. J.A. at 53-74. The relator did not obtain any of these materials as the result of any disclosure in a court proceeding. J.A. at 48, ¶ 7. The relator filed the instant lawsuit on January 4, 1990.

Prior to the relator's disclosure to the VA OIG, no agent of the United States Government had any knowledge of these fraud allegations against BD. J.A. at 51, ¶ 19.

3. The Prior Litigation Involving Becton Dickinson.

In 1989, and 1987, respectively, SSI and another BD distributor, Statim Laboratory Supply, Inc. ("SLS"), filed separate lawsuits against BD in Texas state court. Although the gist of each complaint was to recover damages

[1] Citations to "J.A." refer to the Joint Appendix filed in the court below.

arising from BD's alleged wrongful termination of a distributorship, each complaint also included an allegation that BD had sold items to the Government at prices higher than those charged to other customers. Pet. App. 3a; J.A. at 79-99.

BD settled the SSI lawsuit in September 1989 and the SLS lawsuit in March 1990. In each settlement agreement, at the insistence of BD, the parties agreed to keep the terms and existence of the settlement confidential. Pet. App. 3a.

The SLS and SSI lawsuits alleged nothing about BD's sales and marketing practices that the relator had not already known from his own experience selling BD products to Government and non-Government entities. From his sales work at SSI, and well prior to the SLS and SSI lawsuits, the relator had known of the differentials between the prices BD offered to the federal Government and those BD offered to other customers. Pet. App. 4a; J.A. at 47, ¶ 6.

Although the relator knew of the existence of the SLS and SSI lawsuits, prior to his receipt of BD's Motion to Dismiss filed in the instant case in January 1993, he had not read any of the pleadings filed in those actions. J.A. at 48, ¶ 7.

4. The Procedural History of this Case.

As required by the Act, on January 4, 1991, the relator filed this case under seal to give the Government an opportunity to investigate the case and decide whether to intervene.[2] In October 1992, the United States inter-

[2] Under the Act, the relator must file the complaint under seal and serve a copy of the complaint, as well as a written disclosure of material information and evidence supporting the complaint, on the Department of Justice. The defendant is not served at the commencement of the action. The complaint remains under seal for a 60-day period, subject to unlimited extensions for "good cause," during which time the Government investigates the relator's alle-

vened and this lawsuit was unsealed. The United States and the relator jointly filed an Amended Complaint on December 16, 1992. In January 1993, this case was reassigned from Judge Benson E. Legg to Judge Frederic N. Smalkin.

On January 19, 1993, the defendant filed a Motion to Dismiss both the United States and the relator. On February 10, 1993, Judge Smalkin, without holding an evidentiary hearing, granted the defendant's motion in its entirety.

Judge Smalkin dismissed the United States as a party to the case on the grounds that Judge Legg had exceeded his judicial authority by granting a *nunc pro tunc* request by the Government, dated March 26, 1992, for an extension of the time in which to consider whether to intervene.[3] Judge Smalkin dismissed the relator's lawsuit on the grounds that it was jurisdictionally barred under the False Claims Act.

On appeal, the Fourth Circuit reversed as to the Government, and vacated and remanded as to the relator. The Fourth Circuit held that the Government's failure to file a timely request for an extension was not juris-

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gations. Once the Government has had a chance to investigate, the Government may intervene in the case and prosecute it as the primary plaintiff, in which case the relator is still permitted to participate as a co-plaintiff; or the Government may decline to intervene, in which case the relator may continue to pursue the case on the Government's behalf.

[3] The United States contended that it had filed a timely motion for the extension on March 4, 1992, but that the district court clerk had misplaced the motion. Although the relator was served with the original motion for extension prior to the expiration of the relevant extension, and the Assistant United States Attorney submitted an affidavit saying she had "made sure" the original motion was filed on March 4, Judge Smalkin concluded that the Government failed to demonstrate compliance with the March 4 deadline and that Judge Legg had exceeded the court's jurisdiction in granting the Government's subsequent *nunc pro tunc* motion.

dictional, and that Judge Legg had properly exercised his discretion by granting the Government's *nunc pro tunc* request for an extension. The court held that the relator's action should not have been barred unless the relator learned of his allegations from the prior litigative disclosures, and remanded for a factual determination on that issue. The court further held that the district court had misinterpreted the "original source" rule, improperly adding a third requirement which Congress had not included in the explicit statutory criteria for "original source." [4]

REASONS FOR DENYING THE PETITION

As BD points out, there is a conflict among the Circuit Courts in the interpretation of the phrase "based upon," as well as the definition of "original source." Nonetheless, there are two reasons this Court should deny BD's Petition. First, this case presents an awkward procedural backdrop against which to resolve these legal issues: Unless the Court also reviews and reverses the Fourth Circuit's holding on the Government's intervention in this case, the resolution of the issues concerning the relator's participation will not relieve BD of its burden of litigating this case against the Department of Justice.[5] Second, if BD's Petition is granted, this Court

[4] BD erroneously states that the Fourth Circuit reversed as to the relator and held that the relator was an "original source of the information." *See* Pet. at 10-11. In fact, the Fourth Circuit remanded as to the relator and did not expressly determine whether Mr. Siller actually satisfied the two statutory criteria for an "original source."

[5] The relator submits that BD's Petition is completely without merit as to the Government's failure to seek a timely extension of the deadline for electing whether to intervene. There is no conflict among the Circuit Courts on that issue, and the Fourth Circuit's opinion was based on a straightforward interpretation of Supreme Court precedent. Because the Department of Justice will address that issue in its Opposition to BD's Petition, the relator will not address that point any further herein.

will simply have to affirm the Fourth Circuit's holding on the basis of a well-settled principal of law: that courts must give effect to a statute's unambiguous plain language.

I. BECAUSE OF ITS PROCEDURAL POSTURE, THIS CASE IS INAPPROPRIATE FOR RESOLVING THE CONFLICTS.

In *all* of the Circuit Court cases that BD argues are in conflict with the Fourth Circuit's opinion, the Government had declined to intervene and the relator was continuing the prosecution of the case on his own. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994); *United States ex rel. Kriendler & Kriendler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993); *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992); *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1364 (1993); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990). In those cases, the dismissal of the relator meant the end of the litigation.

By contrast, in this case the Government has intervened and has the "primary responsibility for prosecuting the action." 31 U.S.C. § 3730(c)(1). Thus, in the event the Court declines to review the portion of the Fourth Circuit's opinion reinstating the Government as a party, BD will have to contest the merits of this case against the Department of Justice—no matter what the outcome of BD's efforts to dismiss the relator.

If BD must litigate the merits of this case against the Government, BD will have a significantly diminished incentive to continue seeking the dismissal of the relator. Because the relator's share would come from the Government's recovery, *id.* at § 3730(d)(1), the presence or absence of the relator would not enhance or lessen BD's

underlying liability. Moreover, if the Government offers to settle this case on terms that BD considers reasonable, BD might simply decide to abandon its efforts to dismiss the relator.

The better alternative is for the Court to grant certiorari to review these issues in a case in which the Government has *declined* to intervene. In that situation, the resolution of these issues could be dispositive of the litigation, and both parties would have every incentive to litigate the issues until a decision is reached.

II. THE FOURTH CIRCUIT'S INTERPRETATION OF § 3730(e)(4) IS IN ACCORDANCE WITH ITS PLAIN LANGUAGE AND LEGISLATIVE HISTORY.

Another reason for denying BD's Petition is that the Fourth Circuit simply interpreted the unambiguous plain language of 31 U.S.C. § 3730(e)(4) as it is written—just as this Court requires. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 1030 (1989). Moreover, the Fourth Circuit's reading of the plain language is fully supported by the legislative history of the 1986 Amendments.

A. The Fourth Circuit Properly Interpreted "Based Upon."

Under the language of § 3730(e)(4)(A), the jurisdictional bar applies only to lawsuits that are "based upon the public disclosure of allegations or transactions" in certain enumerated forums. The instant lawsuit was not "based upon the public disclosure of allegations or transactions" in the prior litigation involving SSI or SLS; rather, the relator based this lawsuit upon his personal knowledge derived through his employment with a BD distributor.

BD contends that this case should be barred because the relator's allegations echoed the allegations by SSI and SLS that had been publicly disclosed. However, as the

Fourth Circuit noted, a "reading of 'based upon' as meaning 'derived from' is the only fair construction of the statutory phrase." Pet. App. 18a.

The plain language of § 3730(e)(4)(A) is also consistent with the legislative history of the 1986 Amendments. The "public disclosure" bar was intended to be less restrictive than its predecessor, the "government knowledge" bar of the 1943 Act. The new provision was intended to bar "parasitic" relators who would simply parrot back to the Government information obtained from a public record—information which the Government already had or could have just as easily obtained for itself. Thus, for example, the new provision would bar the relator in *Marcus*, a total stranger to the fraud who simply copied a criminal indictment and filed the allegation as a *qui tam* suit.

However, the new provision was not intended to bar lawsuits by insiders who, unlike members of the public-at-large, could provide new evidence, information, or testimony to the Government. The Senate Report accompanying the 1986 Amendments emphasized the need for insiders not only to trigger new fraud investigations, but also to assist ongoing fraud investigations by providing additional evidence and resources. S. Rep. at 7-8, USCCAN at 5272-73.

The instant case is a prime example of the kind of conduct the Amendments sought to encourage: Notwithsanding any prior "public disclosure" of BD's alleged misconduct, the Government was totally unaware of the allegation prior to the relator's coming forward. The relator's inside information included BD pricing records, documentary evidence of BD's attempts to conceal its scheme, and detailed descriptions of other material documents and witnesses—none of which information had been produced or made part of a public record in the SSI or SLS litigation. This inside information gave the

Government's investigation a running start, and the Government ultimately intervened in the case.

Someone who was a stranger to BD's fraud—a person who just happened to discover the SSI or SLS complaints in the county courthouse—could not have provided the Government with such comprehensive information, and would have been barred from proceeding under the Act. However, neither the language nor the legislative history of the Act indicates that Congress intended to bar an insider such as Mr. Siller—who was able to provide information well beyond the bare allegations contained in the SSI and SLS complaints—because of the mere happenstance that those bare, unsupported allegations were part of a public record.

B. The Fourth Circuit Properly Construed "Original Source."

Likewise, the Fourth Circuit correctly interpreted the unambiguous plain language of 31 U.S.C. § 3730(e)(4)(B), the "original source" provision. That provision explicitly defines "original source" as a person who (1) has "direct and independent knowledge of the information on which the allegations are based," and (2) "voluntarily provided the information to the Government" before filing a *qui tam* action based on the information. The relator fulfilled both of these criteria.

BD contends that § 3730(e)(4)(B) should have included a third criterion, *i.e.*, that prior to any public disclosure of the information, an "original source" must have provided the information to the entity that made the disclosure. In other words, BD argues that Congress did not really mean to require an "original source" to provide information to the "*Government* before *filing* the [*qui tam*] action," *id.* (emphasis added), but instead, Congress meant to require an original source to provide the information to a *non-Governmental* entity prior to the *disclosure* of the information by that entity.

Although BD recognizes that this third criterion is not included in the statute itself, BD counsels this Court to do precisely what this Court has said it will not do: to enlarge a statute " 'so that what was omitted, presumably by inadvertance, may be included within its scope. To supply omissions transcends the judicial function.' " *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991), quoting *Iselin v. United States*, 270 U.S. 245, 250-51 (1926) (Brandeis, J.).

If the Court grants BD's Petition, the Court will be required to come to the same conclusion it has so many times: that Congress writes the laws, not the courts. Because this basic proposition need not be restated once again, the Court should deny BD's Petition.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT L. VOGEL
1225 19th Street, N.W.
Suite 710
Washington, D.C. 20036
(202) 223-1694
Counsel of Record for
Respondent David R. Siller